80-1389

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JOHN MacKENZIE,

Respondent-Defendant.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, SUPREME COURT

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Of Counsel

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Preliminary Statement

The petitioner, in its brief, has supplied this Court with a preliminary statement, the opinions below, a jurisdictional statement, the constitutional provisions the petitioner invokes, and a detailed statement of the facts below. Respondent-Defendant will not burden this Court with another lengthy recitation of material which duplicates the petitioner's brief or, in the opinion of Respondent-Defendant is unnecessary.

The facts required for this Court's determination are relatively limited and undisputed. The Defendant, within seconds of being apprehended by police, made a clear and unequivocal request for an attorney. This demand for counsel was testified to by the arresting officers. (See petitioner's brief at pages 9 and 10.)

Thereafter, defendant was turned over to the custody of other police officers who administered *Miranda warnings*. Continued interrogation by the police officers then led to exculpatory statements and incriminating statements.

The Appellate Division of the New York Courts, following the decision of the Court of Appeals of New York in *People v. Cunningham, 424 N.Y.S.2d 421 (1980)*, found that "once an accused invokes his right to counsel any purported waiver of that right in the absence of counsel is ineffective, and any statements in response to custodial interrogations uttered in the absence of counsel are inadmissible at trial." The Court below went on to "find that all of his subsequent statements, both oral and written, were the product of custodial interrogation, and taken in violation of his right to counsel."

The New York Courts went on to consider the contention of the petitioner, raised in this petition for Writ of Certiorari that the New York rule interferes with an accused's constitutional right to self-representation. The Appellate Division stated that "there is no bar to an accused proceeding *pro se* provided there is a knowing and intelligent waiver of the right to be represented by counsel (*Miranda v. Arizona, 384 U.S. 436*). However, once an accused is given an indication that he does not wish to proceed without the assistance of counsel, that request must be honored before any further custodial interrogation occurs."

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY DETERMINED THE ISSUE RAISED BY PETITIONER

A recently reported case, *Edwards v. Arizona,* reported in the New York Law Journal of May 19, 1981, on page 1, indicates that this Court made a decision which would apparently determine the issue presented by the petition.

Although the opinion of this Court is not available to the Respondent-Defendant, the report in the New York Law Journal would indicate that the Court has held that the police may not try to convince a person in custody to give up his right to a lawyer after he has requested one. This Court is quoted as saying, "When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation."

Thus, this recent opinion of this Court would seem to be controlling and dispositive and, for this reason alone, the Writ should be denied.

II. NEW YORK LAW DOES NOT VIOLATE THE RIGHT TO PROCEED *PRO SE*

The petitioner would give the impression that the New York Courts, in *Cunningham,* is violating the constitutional right to represent oneself. The petitioner, at page 20 of his brief, urges that the New York rule holds that "once a suspect requests counsel, he has by this request deemed himself conclusively incompetent to decide whether to waive his rights and only an attorney can not make that decision for him. He has

irrevocably lost that which our Constitution decries cannot be lost: freedom to choose."

The petitioner's statement is a misrepresentation of the case and a distortion of the effect of the case.

Cunningham holds that "once a suspect in custody requests the assistance of counsel he may not be questioned further in the absence of an attorney. We intend by our holding to make it clear that an uncounseled waiver of a constitutional right will not be deemed voluntary if its is *(sic)* made after the right to counsel has been invoked." *Cunningham, 424 N.Y.S.2d at 422.*

Requesting an attorney, does not cause a defendant to irrevocably lose his right to represent himself. The right is still his and the decision to do so is still his. Once he has requested an attorney however, two rights have come into play. The right to be represented by an attorney and the right to represent oneself. The New York Court has merely indicated, that once a defendant has requested counsel, that both constitutional rights must be protected and that the defendant has a right to consult with an attorney concerning those rights.

The defendant is not forever imprisoned in his declaration of wanting an attorney, and in fact is free to decide to proceed without an attorney, once he has had an opportunity to knowingly waive his right to speak with counsel.

While this Court has prevented constitutional rights from being converted from a shield to a sword to be used by defendant, the District Attorney would now ask this Court to take the

defendant's constitutional rights and convert them from a shield into a sword to be used against defendant. The petitioner would ask that this be done not because the defendant has chosen to testify on his own behalf or taken any advantage of his constitutional rights, but the petitioner would ask that defendant's right to counsel and right to remain silent be less than fully protected, because the defendant has a right to proceed *pro se*.

In short, the petitioner would ask this Court to so scrupulously protect the right of self-representation, that the protections of the Fifth and Sixth Amendments to the United States Constitution would be seriously undermined.

III. NOTWITHSTANDING THE DECISION IN *EDWARDS V. ARIZONA*, PRIOR DECISIONS OF THIS COURT REQUIRE THE RESULT REACHED BY THE NEW YORK COURTS.

A review this Court's decisions would indicate that the New York ruling in *Cunningham* is in compliance with the decisions of this Court prior to *Edwards v. Arizona*.

Even absent this Court's recent ruling in *Edwards v. Arizona*, a review of this Court's language in *Miranda* situations, leads us to the same conclusion that was reached by the New York Court in *Cunningham*.

This Court stated in *Miranda:*

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wished to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without

> the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. (384 U.S. at 473-474.)

The Court went on to say that the police may elect not to provide counsel during a reasonable period of time in which investigation in the field is carried out, but if they do so, they must not question the defendant during that period of time. If interrogation continues, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (384 U.S. 474-475, citing *Escobedo v. Illinois, 378 U.S. 478, 490, n. 14.)*

In affirming a New York decision, it was stated that "*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel." *Harris v. New York, 401 U.S. 222, 224;* see *Walder v. United States, 347 U.S. 62.* The Court went even further when it stated "The Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights requiring that all interrogations cease." *Fare v. Michael C. 442 U.S. 707 at 719 (1979).*

While prior to the Court's recent decision in *Edwards v. Arizona*, as strong a statement had not been made concerning the right to counsel, this Court has certainly taken the position that "if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda, 384 U.S. at 475. North Carolina v. Butler, 441 U.S. 369 at 372-373 (1978).*

A review of the facts of this case conclusively shows that the government has failed to meet the burden required by these earlier cases.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

McKee, Dorris & Peltz
Attorneys for Respondent-Defendant
400 Jericho Turnpike
Jericho, New York 11753
(516) 433-2000

Howard S. Dorris
Harry Peltz, Jr.
Of Counsel

SUPREME COURT OF THE UNITED STATES

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THE STATE OF NEW YORK,

Petitioner,

-against-

JOHN MacKENZIE,

Respondent-
Defendant.

----------x

AFFIDAVIT

No. 80-1529

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JOHN MacKENZIE, being first duly sworn, depose and say that I am the Respondent-Defendant in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

This matter involves a petition for a Writ of Certiorari by the District Attorney of Nassau County. I am responding to that petition and believe that the District Attorney is raising specious issues which have no merit and were not preserved at the trial below.

The attorney who handled my appeal in the State Courts has volunteered his time to represent me, as necessary, in the Supreme Court. I am without funds to pay him and would have had

to seek assigned counsel if he had not volunteered his time.

I have requested assigned counsel from the State of New York on my retrial of these charges and assigned counsel has been granted.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No. I have been in prison since October of 1975 as a result of the charges involved in the instant appeal.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John MacKenzie
JOHN MacKENZIE

Subscribed and sworn to before
me this 26 day of MAY , 1981.

[illegible]
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1982

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT OF THE UNITED STATES

----------x

THE STATE OF NEW YORK,

Petitioner,

-against-

JOHN MacKENZIE,

Respondent-
Defendant.

----------x

RECEIVED
MAY 27 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NOTICE

No. 80-1529

NOTICE IS HEREBY GIVEN that JOHN MacKENZIE, respondent-defendant hereby moves the Supreme Court of the United States for leave to proceed in forma pauperis as respondent to the petition for Writ of Certiorari filed in the above-captioned proceeding on March 6, 1981.

DATED: Jericho, New York
May 7, 1981

McKEE, DORRIS & PELTZ
Howard S. Dorris, of counsel
Harry Peltz, Jr., of counsel
400 Jericho Turnpike
Jericho, New York 11753
(516) 433-2000

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
McKEE, DORRIS & PELTZ
Attorneys for

Office and Post Office Address
400 Jericho Turnpike
JERICHO, NEW YORK 11753

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

M.

Dated,

Yours, etc.,
McKEE, DORRIS & PELTZ
Attorneys for

Office and Post Office Address
400 Jericho Turnpike
JERICHO, NEW YORK 11753

To

Attorney(s) for

Index No. 80-1529 Year 19

SUPREME COURT OF THE UNITED STATES

THE STATE OF NEW YORK,

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NOTICE and AFFIDAVITS

McKEE, DORRIS & PELTZ
Attorneys for Respondent-Defendant
Office and Post Office Address, Telephone
400 Jericho Turnpike
JERICHO, NEW YORK 11753
516 433-2000

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

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STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF Nassau ss.:

Linda Fritsch being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at No. Babylon, NY

☐ Affidavit of Service By Mail — On May 26, 19 81 deponent served the within Notice & Affidavits upon Hon. Denis Dillon, District Attorney for Nassau County attorney(s) for Petitioner in this action, at 262 Old Country Road, Mineola, New York 11501 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on May 26, 19 81

Linda Fritsch
The name signed must be printed beneath

LINDA FRITSCH

Qualified in Nassau County
Term Expires March 30, 1982